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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1385

REGINALD HUTCHERSON, et al., *Appellants,*

vs.

LAURIE LEHTIN, et al. *Appellees.*

On Appeals from the United States District Court for the Northern District of California

Motion of Appellee Laurie Lehtin to Dismiss or Affirm

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Motion of Appellee Laurie Lehtin to Dismiss or Affirm

Appellants have taken separate appeals from an order of a three-judge district court denying a preliminary injunction and from a later final judgment declaring that the California unlawful detainer statute is valid and constitutional in respects assailed by appellants.

Appellee Laurie Lehtin hereby moves the Court to dismiss the appeals or to affirm on the following several grounds: (1) The controversy is moot. (2) Jurisdiction was lacking in the court below. (3) Jurisdiction to hear this appeal is lacking. (4) In any event, the order and judgment appealed from are plainly right and should be summarily affirmed because the questions presented are so unsubstantial as not to need further argument.

assert in the unlawful detainer proceedings. Because the proposed defenses and counterclaims are not permitted in a California unlawful detainer action, which is a special proceeding, prohibition was denied. No appeal to higher California courts was taken from the denial. At the trial in the Municipal Court, evidence of failure to repair the premises was rejected on the same ground, and, as default in payment of rent was not contested, judgment was entered that the landlord was entitled to possession and for the unpaid rent.

Without appealing from this judgment to a higher state court, as they had a right to do, and while the time for an appeal was still open, appellants filed this action in the United States District Court to enjoin enforcement of the state court judgment and for a declaration that the California unlawful detainer statute violates the 14th Amendment as preventing "tenants of substandard dwellings from raising defenses and counterclaims relating to and arising out of the condition of their dwellings."[3] Although the complaint alleged that appellants sued on behalf of all California tenants living in "substandard dwellings," no action was taken as provided and required by F.R.Civ.Proc. Rule 23 to determine that the action might be maintained as a class action.

The court below issued a temporary restraining order against enforcement of the state court judgments, and no steps have ever been taken to enforce them. A three-judge court was convened, and appellants applied for a preliminary injunction. Before the court heard the application for a preliminary injunction, *five of the six appellants voluntarily vacated the premises.*

Appellee filed a written suggestion that the court lacked jurisdiction and a motion to dismiss. After hearing the several motions, the three-judge court, by-passing appellee's contention of lack of jurisdiction, denied the application for a preliminary injunction. Treating appellee's motion to dismiss as one for summary judg-

3. Compl., prayer, paras. 3, 4, p. 5.

ment, the court granted it as to all issues except one. That issue related to appellants' claim that the unlawful detainer suit was in retaliation for complaints to public authorities over the condition of their apartments. Appellants later abandoned the contention of retaliation, and, when this was called to the court's attention, final judgment of dismissal was entered.[4]

The sole issue left in the court below was whether California procedure violates (a) the due process clause or (b) the equal protection clause of the 14th amendment in not permitting in the special proceeding of unlawful detainer affirmative defenses of breach by the landlord of a covenant to repair or of dilapidation, disrepair or non-conformity of premises with municipal codes. No issues of fact were presented by appellants.[5] Concededly, California law does not permit these claims as defenses in an unlawful detainer proceeding but permits them to be asserted in a separate action.

A week after the three-judge court denied the preliminary injunction and about one month before entry of the final judgment, *the sixth appellant voluntarily vacated the premises, as the other five had previously done* (Hoogs Aff., para. 4). Thus the Municipal Court judgment for possession was never enforced and never need be.

ARGUMENT

I. The Case Is Moot.

The appeals from the denial of a preliminary injunction against the landlord's enforcing his judgments for possession are plainly

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4. Appellant's Jurisdictional Statement informs this Court that it does not bring the issue of retaliation here (p. 4, fn. 3).

5. We do not believe that the Jurisdictional Statement (at p. 9) intends to suggest that there were factual questions, because such a claim would be in defiance of the record. Not only was the whole record on the issue in the Municipal Court before the District Court, but the latter offered appellants the opportunity to present any further facts and appellants did not accept the opportunity. F.R.Civ.P. Rule 56(e) provides how the existence of issues of fact, sufficient to defeat a motion for judgment, is to be shown, by affidavit. The court below advised appellants, "You have a right to file affidavits here" (R.Tr. 76), but none was tendered.

moot. Five of the six appellants voluntarily relinquished possession before the application for a preliminary injunction was heard, and the sixth voluntarily did so before final judgment was entered below. The single office of a preliminary injunction is to preserve the *status quo* pending trial. With appellants voluntarily vacating the premises, no *status quo ante* remained to be preserved, there was nothing to which to direct a permanent injunction, and there is no subject matter on which a judgment of this Court could operate. *Brownlow v. Schwartz,* 261 U.S. 216 (1923); *Oil Workers Unions v. Missouri,* 361 U.S. 363 (1960).

The case is also moot with respect to the request for a declaratory judgment of unconstitutionality. With appellants' voluntary vacation of the premises, what remained was a law professor's request for an advisory opinion about constitutionality of state law. In *Oil Workers Unions v. Missouri,* supra, public utility employees struck in violation of a Missouri statute, a state court enjoined the strike, the strike terminated, a new labor contract was made, and the injunction expired according to its terms. This Court declined to consider the claim that the Missouri statute was unconstitutional, saying (pp. 367-368):

> "* * * the duty of this Court 'is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' [citations] To express an opinion upon the merits of the appellants' contentions would be to ignore this basic limitation upon the duty and function of the Court, and disregard principles of judicial administration long established and repeatedly followed."

These appeals are not saved by a claim that the case is a "class action" on behalf of all California tenants living in allegedly "substandard" housing, for three separate reasons: (1) It is not a class action. Under new F.R.Civ.P. Rule 23(c), an action be-

comes a class action only if and when the court determines after hearing and on findings that it shall be so maintained. Appellants never brought the matter on for any such determination, and there was none. (2) There is no actual controvery shown to exist respecting the unidentified members of the "class"; the action would be simply a request for an advisory opinion. (3) The absence of any controversy affecting appellants deprives *them* of the right to represent such class if its exists.[6]

II. Jurisdiction Was Lacking.

A. Lack of jurisdiction of this appeal.

This Court's jurisdiction to hear a direct appeal from a three-judge court is conferred by 28 U.S.C. § 1253. It is confined to an appeal from an order granting or denying an injunction. Here the appeal from the order denying an injunction is moot, as just seen. What is left is an appeal from the judgment granting a declaration of constitutionality after any injunctive relief was moot. That is not appealable. *Goldstein v. Cox*, 396 U.S. 471 (1970) is directly in point. Attacking constitutionality of a New York statute, appellants' complaint there prayed for a preliminary injunction against enforcement of the statute, but they moved for a summary judgment that the statute was unconstitutional without explicitly applying for injunctive relief. This Court dismissed an appeal from an order denying summary judgment for lack of jurisdiction. Said it (p. 478):

> "This Court has more than once stated its jurisdiction under the Three Judge Court Act is to be narrowly construed since 'any loose construction of the requirements of [the Act] would defeat the purposes of Congress . . . to keep within narrow confines our appellate docket.' "

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6. *Carroll* v. *Associated Musicians of Greater New York*, 316 F.2d 574 (2 Cir.); *Sciulli* v. *Tronzo*, 304 F.Supp. 1142 (W.D. Pa., October 9, 1969)

B. Lack of jurisdiction below.

The issues appellants raised below and seek to raise here relate to constitutionality of a state statute as applied in the state court. Those issues not only could be raised in the state court. *They in fact were,* both in the unlawful detainer proceeding in the Municipal Court[7] and in the prohibition proceedings in the California Superior Court. From the adverse decisions in the state courts appellants could have appealed to a higher California Court (C.C.P. § 17. If in such an appeal the highest state court held against them, they could come here by direct appeal under 28 U.S.C. § 1257(2). That was the route that had to be pursued. No "lateral appeal" to a lower federal court is authorized, whatever the form of application to such a court. This Court has frequently so held. *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923); *England v. Medical Examiners,* 375 U.S. 411 (1964); and see *Angel v. Bullington,* 330 U.S. 183, 189 et seq (1947).

As said in *Rooker* (263 U.S. at 415, 416):

> "If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. [citations omitted] Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character. [citation omitted] To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original."

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7. By the Ninth and Twelfth Affirmative Defenses in the Answers in the Municipal Court. See Affidavit of William R. Petrocelli, Ex. C. In the court below appellants correctly represented these two defenses in the Municipal Court as raising the constitutional claims asserted here (R. Tr. 29, 30).

To the same effect are *Brown v. Chastain,* 416 F.2d 1032 (5 Cir. 1969); *Gately v. Sutton,* 310 F.2d 1027 (10 Cir. 1962); *Ash v. Northern Ill. Gas Co.,* 362 F.2d 148 (7 Cir. 1966).

III. The Order and Judgment Appealed from Are Plainly Right, and the Constitutional Questions Are Not Substantial.

Nothing in the text of the California unlawful detainer statute was claimed by appellants to be unconstitutional (R.Tr. 37). The claim is that the statute as construed by the courts is unconstitutional in that neither (1) failure of a landlord to perform an express or implied covenant to repair nor (2) maintenance by a landlord of rental premises not conforming with municipal codes is a defense in unlawful detainer proceedings for non-paymnt of rent.[8] The unlawful detainer statute is so applied by California courts.

California's unlawful detainer proceeding is a special proceeding. The statute provides for a three-day notice to pay rent or quit before suit may be filed (C.C.P. § 1162).[9] After suit is filed a summons issues to answer in three days (C.C.P. § 1167). C.C.P. § 1178 provides for an appeal. C.C.P. § 1179 permits a defendant within thirty days after entry of the judgment to petition the Municipal Court itself for an order relieving him from deprivation of his tenancy and restoring him to possession upon payment of rent past due. No such application was made by any appellant here.

The policy underlying the statute was explained by Justice Roger Traynor, later the distinguished Chief Justice of California, in

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8. There is no claim that appellants are victims of racial discrimination. In the prohibition proceedings in the California Superior Court, the court asked appellants' counsel to state whether he claimed that the detainer cases were brought because of appellants' race, a fact which California recognizes as an absolute defense in an unlawful detainer proceeding, *Abstract Investment Co. v. Hutchinson,* 204 C.A.2d 242, 22 Cal. Reptr. 309. Counsel replied that appellants made no claim of discrimination against them based on race. Exhibit B to Affidavit of William R. Petrocelli.

9. "C.C.P." refers to the California Code of Civil Procedure. The unlawful detainer statute is contained in §§ 1161, et seq. and is set forth in the Appendix B to Appellants' Jurisdictional Statement.

Jordan v. Talbot, 55 Cal.2d 597, 361 P.2d 488 (1961). It is to eliminate "any claim that self-help is necessary" and "to prevent bloodshed, violence and breaches of the peace too likely to result from wrongful entries into the possessions of others" (55 Cal.2d at 607). The expeditious nature of California's detainer procedure has been repeatedly upheld as necessary for a wise determination of the right to possession of rental property as between the owner and a tenant who cannot or will not pay rent. In 1928 in *Telegraph Ave. Corp. v. Raentsch,* 205 Cal. 93, 269 P.2d 1109, the California Supreme Court held that no counterclaims were permitted in an unlawful detainer action. Rejecting a contention that this was a denial of equal protection, it said (pp. 97, 98) that the legislative distinction between detainer actions and other civil cases in which all claims between the parties can be tried out at one time was "natural and reasonable" in view of the need "for a quick and ready determination" of the right to possession of rental property as contrasted with the different considerations pertinent to "ordinary cases at law or in equity".

This does not mean that the tenant is denied access to court for any grievance against his landlord. California gives him right to a full judicial trial of *any* grievance whatever respecting the condition of rented premises.[10] California law says only that where a tenant pays no rent he cannot assert the condition of his premises as a defense in the *unlawful detainer action.* He must litigate such claims in a separate action, unless he chooses to surrender possession, *Knowles v. Robinson,* 60 Cal.2d 620, 387 P.2d 383 (1963), in which event cross-claims are permitted as in any other civil proceeding.

California has provided a complete and fair scheme of substantive rights and obligations as between landlord and tenant and a series of procedures for their enforcement. C.C.P. § 1941 requires the landlord to maintain premises rented for human hab-

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10. Appellants' Jurisdictional Statement cites numerous California decisions to this effect (p. 18, fns. 26, 27, 28).

itation in a manner fit for the purpose. A tenant, dissatisfied with the conditions of his premises, has several remedies, all of which appellants eschewed: (1) He may continue to pay rent, continue to occupy the premises, and sue the landlord for damages.[11] (2) If the premises are unfit for habitation, he may withhold up to a month's rent, make repairs himself, and apply the withheld rent, C.C.P. 1942, or he may vacate without liability for further rent. (3) He may surrender possession after the landlord sues in unlawful detainer and counterclaim for damages.[12] (4) He may litigate the unlawful detainer action and, if judgment goes against him, he may apply within thirty days of judgment for relief upon payment of rent, C.C.P. 1179. (5) Or he may litigate the unlawful detainer action and either concurrently or later, as he will, file suit in the same or any other court of venue for all his claims of damages. No constitutional right is denied by providing that a claim must be filed as a complaint in a separate action instead of as a counterclaim. Procedural choices like this are left for each state to make.

The situation in California is entirely different from that involved in *Shanks v. Georgia*, No. 266, October Term 1969, on appeal from the Georgia Supreme Court in *Georgia v. Shanks*, 225 Ga. 88, 166 S.E.2d 19 (1969). That appeal involved a challenge to Georgia's "summary disposses procedure" (Ga. Code §§ 61-303 et seq.) which requires a tenant allegedly owing rent to post a bond for double the rent claimed as a condition to the right to defend at all. A commentator has recently contrasted the Georgia and California detainer procedures and concluded that California's provides fairly "for all of the normal incidents of a civil proceeding."[13]

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11. Authorities cited, Juris. St., p. 18, fns. 26 and 27.

12. *Knowles* v. *Robinson*, supra.

13. Comment, "Poverty and Equal Access to the Courts: The Constitutionality of Summary Disposses in Georgia", 20 Stanford L.Rev. 766, 776 (April 1968).

Appellants' claim is not really that there is any lack of procedural due process. The citations in their Jurisdictional Statement on the kind of hearing required by due process in various situations[14] are far afield because California law *does* entitle a tenant to a full judicial hearing of any and every dispute with his landlord. No decision has ever suggested that the hearing of all grievances must be in the unlawful detainer proceeding, rather than in another suit. Similarly, *Sniadach v. Family Finance Corp.*, 395 U.S. 337, and *Wheeler v. Montgomery*, ... U.S. ....., 38 U.S.L.W. 4231 (March 23, 1970), are not in point here. *Sniadach* held that a debtor's wages cannot be garnished without first giving him a hearing. *Wheeler* held that a recipient of welfare benefits must be accorded an administrative hearing, fair in nature, before payments are terminated. Here there was a plenary trial before any judgment was rendered in the Municipal Court.

Appellants' real claim is that the 14th Amendment imposes on California a substantive rule of law in the field of landlord and tenant different from that selected by the California legislature. The claim is that a tenant has a federal constitutional right to occupy premises and refuse to pay rent until the landlord makes repairs to the tenant's satisfaction or a court determines that claimed untenantable conditions do not exist after what might be a prolonged delay. Such rule of law would probably drive from the rental housing market owners presently striving against difficult odds to meet the needs of that market. As stated by a recent commentator in "Rent Withholding and the Improvement of Substandard Housing," 53 Cal.L.Rev. 304, 336:

> "Substandard buildings are usually old, and they can be repaired and maintained according to ever rising standards for only so long. Eventually they must be torn down and replaced with new housing adapted to the needs of low income facilities. Neither rent strikes nor any other means of housing law enforcement can bring this about directly."

14. E.g., Mr. Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 163; *Holt* v. *Virginia*, 381 U.S. 131.

But these are questions of policy, not constitutional law. The problems inherent in low income urban housing need the kind of study best available from legislative bodies or administrative agencies. By pointing to Michigan and New York statutes as being preferable to California law, and by praising a "Model Residential Landlord-Tenant Code" issued as a tentative draft by the American Bar Foundation,[15] appellants give testimony that the questions are legislative, not constitutional. They recognize the chaos which would be created by the rule of law which they argue the Constitution requires, and they offer their own legislative suggestions for amelioration of that chaos, by suggesting that "the legislature might limit the time for discovery and preparation" of the lawful detainer case, limit issues and claims to the amount of rent past due, provide for deposit in court of rent, and the like.[16] All this, again, is testimony that the questions are legislative, not constitutional.

We submit that the appellants' claims lack any merit.

CONCLUSION

We respectfully submit that the motion to dismiss should be granted for lack of jurisdiction or mootness or both, and that, if the Court should believe that there is any remaining "case or controversy" over which there is jurisdiction, the appeal should be dismissed or the order and judgment should be affirmed, without further briefing or argument, for lack of any substantial federal question.

Dated: San Francisco, California, May 1, 1970.

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15. Juris. St., pp. 14, 15.
16. Juris. St. p. 15.